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No. 97-995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BROWNING-FERRIS, INC., *et al.*,
Petitioners,

v.

SUN COMPANY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Petition for Certiorari documents the confusion in the lower courts as to the relationship between CERCLA contribution actions under section 113(f) and cost recovery actions under section 107(a), and the appropriate statute of limitations for contribution actions. In their 29-page Opposition, respondents fail to offer even a colorable basis for harmonizing these decisions with the Tenth Circuit's. Remarkably, respondents dismiss inconvenient holdings as mere "dicta," and urge the Court to let the conflicting holdings stand because of immaterial differences in the factual background against which those rulings were rendered. These attempts to obscure (and thereby insulate from review) the basic and recurring question of statutory interpretation presented by this case should be rejected.

1. Respondents assert that this case "arises out of a unique set of facts" (Opp. 1) because it involves a cleanup performed in response to a unilateral administrative order of the Environmental Protection Agency pursuant to CERCLA § 106, 42 U.S.C. § 9606. The Court should not be misled on this point. Section 106 orders are hardly "unique." According to an EPA report for fiscal year 1996, section 106 orders were responsible for roughly 30% of the funds spent on remedial work by potentially responsible parties ("PRPs") at sites listed on the EPA's National Priority List ("NPL"). EPA, *Enforcement and Compliance Assurance Accomplishments Report: FY 1996* § 2.3, at 2-3 to 2-4 (May 1997). In monetary terms, the 70 unilateral administrative orders issued by EPA in FY 1996 translated into an estimated $196 million of cleanup costs for FY 1996 that were borne by polluters instead of federal taxpayers.[1] *Id.* at

[1] The importance of section 106 orders to federal environmental enforcement efforts is likely to increase substantially given recent guidance from the EPA encouraging its Regional Offices to "consider using CERCLA § 106(a) instead of or in addition to [Resource Conservation and Recovery Act] § 7003," 42 U.S.C. § 6973. EPA Ofc. of Enforcement and Compliance Assurance, *Guidance on*

2-4. Accordingly, cases involving section 106 orders are far from unique.

2. Turning to the case law, respondents first attempt to redefine the issues in the case. They assert, albeit nakedly, that "the delineation between contribution actions and cost recovery actions . . . is not the issue presented here for review." Opp. 1. Respondents are wrong.

The Tenth Circuit below described itself as "faced with the task of further defining and clarifying the relationship between §§ 107 and 113 of [CERCLA]." Pet. App. 3a. This is necessarily so because under section 113(g)(2) and (3), the selection of the applicable statute of limitations depends upon the relationship between the two types of CERCLA actions. The six-year limitations period held applicable below (42 U.S.C. § 9613(g)(2)(B)) explicitly applies only to "Actions for recovery of costs" (*i.e.*, cost recovery actions) whereas the limitations period that should have been applied (42 U.S.C. § 9613(g)(3)) governs "action[s] for contribution." Thus, the relationship between cost recovery and contribution actions is squarely in issue here—which is why respondents find it necessary to argue (and why the court below ruled, see Pet. App. 9a) that, for statute of limitations purposes, the two authorizing provisions of CERCLA "work together and are not mutually exclusive." Opp. 11.

3. As previously shown (Pet. 12-22), the decision below conflicts with three sets of decisions interpreting CERCLA. *First*, contrary to the Tenth Circuit's erroneous ruling that "all" actions for contribution under CERCLA "are 'actions under § 107' for purposes of liability" (Pet. App. 15a), with CERCLA § 113(f) providing "no more than a mechanism for apportioning [CERCLA]-defined costs" (Pet. App. 9a (internal quotation marks omitted)), the First, Third and Fifth Circuits

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the Use of Section 7003 of RCRA 6 (Oct. 1997). The EPA further noted that section 106 orders "provide greater incentive for the respondent to comply" given the substantially higher penalties under CERCLA for noncompliance. *Id.* at 7.

have followed the plain meaning of section 113 in reaching the opposite view.[2] *Second*, the First and Seventh Circuits have ruled, in disagreement with the court below, that the applicable statute of limitations for contribution actions is three years from the date of the occurrence of a triggering event under section 113(g)(3) and that section 113(g)(2) does not prescribe the limitations period for actions by and between PRPs.[3] *Third*, the Circuits are

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[2] *See, e.g., In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997) (holding, based on "CERCLA's plain meaning," that section 113(f) "replace[d]" the pre-SARA implied right of action for contribution under section 107(a) and thus represents "the sole means for seeking contribution"); *United Techs. Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994) (ruling that "cost recovery and contribution actions are distinct and do not overlap"); *OHM Remediation Servs.* v. *Evans Cooperage Co.*, 116 F.3d 1574, 1582 (5th Cir. 1997) (holding that "section 113(f) was not meant to be duplicative of section 107(a)" and confers on PRPs a "cause of action" for contribution). Given these rulings—particularly the unequivocal holding in *United Technologies* that "cost recovery and contribution actions are distinct and do not overlap" (33 F.3d at 100)—respondents' assertion that "[n]one of those circuit courts have ruled that the two actions under CERCLA are mutually exclusive and non-overlapping" (Opp. 10) is simply false.

[3] *See Rumpke of Ind., Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997) (holding that contribution claims do "not accrue until one of the events specified in § 9613(g)[(3)] occur[], at which time three years would be available in which to file an appropriate suit"); *United Techs.*, 33 F.3d at 99 (1st Cir. 1994) (holding that "the shorter prescriptive period, contained in 42 U.S.C. § 9613(g)(3), governs actions brought by liable parties . . ., while the longer statute of limitations, contained in 42 U.S.C. § 9613(g)(2), addresses actions brought by innocent parties that have undertaken cleanups"); *but see* Pet. App. 12a & n.3 (ruling that section 113(g)(2) provides the applicable limitations period for contribution actions absent a triggering event under section 113(g)(3)). *Compare also id. with Gould Inc.* v. *A & M Battery & Tire Serv.*, 901 F. Supp. 906, 915 (M.D. Pa. 1995) (holding that absent such an event, a claim for contribution can never be time-barred); *Reichhold Chems., Inc.* v. *Textron, Inc.*, 888 F. Supp. 1116, 1125 (N.D. Fla. 1995) (same). These latter district court decisions are cited not as a "conflict" for purposes of this Court's Rule 10 (Opp. 24-25), but rather as an illustration that "this area of law is

in conflict over the proper interpretation of this Court's opinion in *Key Tronic Corp.* v. *United States*, 511 U.S. 809 (1994).[4]

Respondents devote the bulk of their discussion (Opp. 11-25) to an effort to paper over these conflicts among the lower courts. Respondents dismiss conflicting holdings as "dicta," and, when that ploy fails, respondents attempt to distinguish the conflicting decisions on their facts. Neither tack provides any basis for ignoring the plain conflict among the lower courts on the statute-of-limitations question, as well as the larger, related question of the proper relationship between cost recovery and contribution actions.

a. Respondents' treatment of *Reading* is as audacious as it is wrong. Respondents would have this Court believe that "[t]here is no 'expressly acknowledged' conflict between [the ruling below] and *Reading*." Opp. 15. Here again, respondents claim to understand the case better than the court that actually decided it. Noting *Reading*'s holding that PRPs cannot "end run" the statutory restrictions on contribution (one of which is the three-year limitations period set forth in section 113(g)(3)) by characterizing their contribution claims as cost recovery claims, the Tenth Circuit forthrightly rejected that holding as "reflect[ing] a misconception of the relationship between §§ 107 and 113." Pet. App. 14a. If this is not an "express acknowledgment" of a decisional conflict, petitioners are at a loss to understand what is.

Respondents assert (Opp. 13) that "*Reading* and *Sun Co., Inc.* both consistently stand for the proposition that PRPs suing under CERCLA are limited to contribution actions which equitably apportion liability for response

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rife with confusion and disagreement among the lower courts." Pet. 21.

[4] *Compare* Pet. App. 13a (*Key Tronic* compels conclusion that contribution actions are cost recovery actions) *with Reading*, 115 F.3d at 1120 (3d Cir. 1997) (rejecting this interpretation of *Key Tronic*); *United Techs.*, 33 F.3d at 103 n.12 (1st Cir. 1994) (same).

costs." Indeed, respondents claim (Opp. 21) that all the decisions cited in the petition are uniform on this point. Petitioners have never suggested otherwise. As pointed out in the Petition (Pet. 2 & n.1), the courts of appeals have uniformly rejected respondents' contention below that PRPs should be permitted to seek joint and several liability against other PRPs under section 107(a). That question, however, is not presented here. The issue here—and the issue on which *Reading* and the Tenth Circuit are in acknowledged conflict—is whether a PRP can assert a claim for contribution under section 107(a) and thereby evade the restrictions on such claims contained in section 113. Obviously, the fact that all Circuits agree that joint and several liability is not available in a suit by and between PRPs provides no basis for ignoring the disagreement among appellate courts on the separate question of whether a suit for contribution lies under section 107(a), as opposed to section 113(f), in the first place.

Respondents make much of the fact that, as petitioners noted (Pet. 14), the Tenth Circuit held that, with the glaring exception of the three-year contribution statute of limitations, no limitation on contribution actions contained in section 113 can be avoided through reliance on section 107(a). Opp. 14. That fact only highlights the conflict between the decision below and *Reading*. Under *Reading*, section 107(a) can *never* be a basis for recovery in a suit by and between PRPs. To allow such recovery, the Third Circuit ruled, would contravene CERCLA's plain meaning and "throw the proverbial monkey wrench into the works" by allowing PRPs to side-step the restrictions on section 113 contribution actions. 115 F.3d at 1120. The statutory "settlement bar" rule discussed in *Reading* is one such restriction; the three-year statute of limitations is another.[5] *See* 42 U.S.C. § 9613(g)(3). By

[5] Therefore, it is immaterial that *Reading* did not involve a timeliness challenge. Like the court below, *Reading* squarely ruled on the relationship between contribution and cost recovery actions under CERCLA. This discussion was an essential part of the holding in both cases and cannot be dismissed as mere dicta.

allowing respondents, as admitted PRPs, to use section 107(a) to avoid the three-year limitations period Congress enacted for all contribution actions, the court below performed precisely the sort of end-run condemned in *Reading*.[6]

b. Faced with the First Circuit's leading decision in *United Techs. Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994), respondents are forced to choose their adjectives carefully. They assert that the First Circuit did not "*directly* confront[]" the statute of limitations issue (Opp. 12) and that there is "no *real* conflict" between the First and Tenth Circuits (Opp. 18) (both emphases added). Such hair-splitting cannot mask the conflict between the two courts. The sole issue on appeal in *United Technologies*, as here, was whether suits by and against PRPs can be initiated outside of the three-year limitations period set forth in section 113(g)(3), on the theory that such suits are cost recovery claims subject to the six-year statute of limitations contained in section 113(g)(2). 33 F.3d at 98.

The First Circuit correctly ruled that the three-year limitations period for contribution suits is controlling in suits between PRPs, not the cost recovery statute of limitations: "[T]he shorter prescriptive period, contained in 42 U.S.C. § 9613(g)(3), governs actions brought by liable parties [*i.e.*, PRPs] . . ., while the longer statute of limitations, contained in 42 U.S.C. § 9613(g)(2), addresses actions brought by innocent parties that have undertaken cleanups." 33 F.3d at 99. The Tenth Circuit below reached the opposite result, holding that the longer limitations period *can* apply to actions brought by PRPs, as long as the PRPs win the race to the courthouse. Pet. App. 15a. On

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[6] Consequently, respondents' claim that "[t]he end result is the same" under both *Reading* and the decision below (Opp. 15) is plainly wrong. Under the *Reading* rule (applied by the district court), respondents' contribution suit would be time-barred under the contribution statute of limitations; under the rule applied by the court of appeals, the suit is timely under the longer cost recovery statute of limitations.

their face, therefore, the two decisions are in conflict, and even respondents cannot bring themselves to argue that the holding in *United Technologies* is dicta.

Respondents accordingly argue (Opp. 16-17) that the First Circuit declined to decide whether its reasoning would apply in the absence of a statutory triggering event. The argument is disingenuous. As noted in the Petition (Pet. 16 n.7), the First Circuit did not decide whether the longer limitations period would be available to "a PRP who spontaneously initiates a cleanup without governmental prodding." 33 F.3d at 99 n.8. Here, as the district court itself noted (Pet. App. 25a n.6), it took significant "governmental prodding"—namely, a section 106 order by the EPA, backed by the prospect of daily fines of more than $25,000 for noncompliance (see 42 U.S.C. § 9606)—for respondents to accept responsibility for their pollution of the Site. Thus, the First Circuit did not leave open the issue decided erroneously by the court of appeals below; to the contrary, the First Circuit decided that issue, adversely to respondents here. This Court should resolve this conflict.[7]

c. Respondents take extraordinary license with the decision in *Rumpke of Indiana, Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235 (7th Cir. 1997). They assert (Opp. 23) that *Rumpke* "adopted the same implied contribution right recognized by *Sun Co.*" That assertion is plainly wrong. *Rumpke* merely held that an "innocent landowner"—de-

[7] Respondents' further suggestion (Opp. 17-18) that the First Circuit would not have reached the same result in a case where no statutory triggering event has occurred likewise ignores the basis of the decision in *United Technologies*. The First Circuit held that the phrase " 'recovery of costs' " is "reiterative of the subsection heading 'Actions for recovery of costs' " and "suggests full recovery." 33 F.3d at 100. This plain meaning approach to the word "recovery" forecloses respondents' speculation. Under *United Technologies*, an action by a PRP to recover anything less than all of its costs of response simply is not an "action[] for recovery of costs"—which, after all, is why that court declined to apply the cost recovery statute of limitations and instead applied the three-year contribution statute of limitations.

fined as a party who owns a contaminated site but has "contributed nothing to the hazardous conditions" there (107 F.3d at 1240)—can bring suit for joint and several liability under section 107(a). Obviously, this carefully tailored rule is quite different from the blunderbuss approach adopted by the Tenth Circuit below. As *Rumpke* explained, the innocent landowner rule permits landowners not responsible for polluting the site "to recover for direct injury to its own land, under circumstances where it is not trying to apportion costs (*i.e.*, where it is seeking to recover on a direct liability theory, rather than trying to divide up its own liability for someone else's injuries among other potentially responsible parties)." *Id.* PRPs, such as respondents, who do not qualify as innocent landowners under *Rumpke* "would *not* be entitled to recover under [a] § 107(a) theory," for "when two parties who both injured the property have a dispute about who pays how much—a derivative liability, apportionment dispute—the statute directs them to § 113(f) and *only* to § 113(f)." *Id.* (emphasis added).

The court of appeals below, by contrast, threw the doors to section 107(a) wide open to an entirely different type of action that is fundamentally at odds with that recognized in *Rumpke*. The implied right of action endorsed below, far from being restricted to innocent landowners, is available even to parties, such as respondents, who are admittedly guilty of polluting a site. Pet. App. 12a. In further contrast with *Rumpke*, which properly restricted section 107(a) to actions seeking to hold PRPs jointly and severally liable for the entirety of the plaintiffs' response costs, the Tenth Circuit eviscerated the express right of action for contribution in section 113(f)(1) by creating an implied federal common law right of action under section 107(a) for an equitable allocation of shared liability (*i.e.*, contribution). Pet. 22-26. Given these important differences in the two types of section 107 actions at issue here and in *Rumpke*, respondents' assertion that *Rumpke* recognized "the *same* implied contribution right" adopted below (Opp. 23 (emphasis added)) is patently false.

Equally false is respondents' claim that *Rumpke* "discussed statutes of limitations in dicta." Opp. 23. The Seventh Circuit's studied conclusion that a contribution claim "[does] not accrue until one of the events specified in § 9613(g)([3]) occur[s], at which time three years would be available in which to file an appropriate suit" (107 F.3d at 1241) was not a fleeting statement unnecessary to the holding. To the contrary, it was only proper for the Seventh Circuit to consider the effect of its recognition of innocent landowner standing under section 107(a) on the restrictions on contribution actions contained in section 113. The defendant PRPs in *Rumpke* argued that construing section 107(a) to permit suits by innocent landowners would allow innocent landowners to evade the three-year statute of limitations for contribution actions in cases where, as here and in *Rumpke* itself, no triggering event under CERCLA § 113(g)(3) has occurred. *Id.* at 1241. The court concluded that the defendants' statute of limitations arguments "provide no reason for concern": Given that a contribution claim does not accrue until a triggering event occurs, "it would therefore be impossible to use § 107(a) as a tool for obtaining an advantage for limitations purposes." *Id.* The statute of limitations issue, therefore, was essential in *Rumpke*, and that decision stands in conflict with the Tenth Circuit's below.[8]

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[8] Apparently lacking confidence in their claim that *Rumpke* was mere dicta, respondents assert that the Seventh Circuit's ruling "would be inconsistent with the public policy of CERCLA" (Opp. 24). They fail to address the obvious fact that the *Rumpke* rule *promotes* CERCLA policy by encouraging polluters targeted by the EPA promptly to settle with the agency and commence remediation instead of doing what respondents did here—namely, delay cleanup efforts until the EPA issues a section 106 order as a last resort. Pet. 19. Although respondents assert, with only a citation to CERCLA § 107(a)(4)(B), that "Congress clearly did not intend to deprive certain categories of PRPs of a right [to] contribution" (Opp. 24), the short answer is that *Rumpke* does not "deprive" PRPs of contribution rights but rather governs when those rights vest (and when those rights are time-barred). In any event, this Court has ruled that section 107(a)(4)(B) "does not expressly command"

d. Respondents do not (and cannot) deny the existence of a square split of authority in the Circuits on the meaning of language from *Key Tronic*, 511 U.S. at 816, suggesting that sections 107(a) and 113(f) are "similar and somewhat overlapping" (see *supra* n.4). As previously noted (Pet. 25 n.11), this conflict has important ramifications for the recurring problem of delineating the boundaries between cost recovery and contribution actions and determining the applicable statute of limitations. This doctrinal problem provides an additional reason for this Court to grant certiorari here, which may explain why respondents have ignored it. Petitioners also note that respondents do not defend the ruling below in light of petitioners' demonstration (Pet. 22-26) that the Tenth Circuit improperly relied on a federal common law implied right of action for contribution despite the express right of action for contribution contained in section 113(f)(1).[9]

* * * *

The petition for certiorari should be granted.

Respectfuly submitted,

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that any PRP is entitled to contribution. *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 n.11 (1994).

[9] To the extent there is any question as to the correctness of petitioners' claim (Pet. 26-28) that state law can and should be borrowed to fill the interstices of CERCLA, this case should be held pending this Court's decision in *United States* v. *CPC Int'l Inc.*, No. 97-454. In that case, the Court will decide whether state corporate law should be borrowed in determining whether the parent of a subsidiary corporation that operates a hazardous waste site can be held liable under CERCLA § 107(a)(2).